LIEN CHUNG CREDIT & LEASING SDN. BHD.

v.

CHANG CHIN CHOI

HIGH COURT MALAYA, JOHOR BAHRU
DATO' MOHD. GHAZALI BIN MOHD YUSOFF JC
[CIVIL APPEAL NO. 12-7-1990]
3 JULY 1994

MONEYLENDING: Appellant licensed moneylender - Respondent failing to repay loan taken from appellant - Appeal against decision of Sessions Court dismissing appellant's claim - Whether post-dated cheque given by respondent to appellant is a security within the contemplation of s. 16(1) of the Moneylenders Ordinance 1951 - Whether failure to include particulars of the post-dated cheque in the memorandum was fatal to the appellant's case.

The respondent borrowed the sum of RM35,000 from the appellant, a licensed moneylender. The appellant sued the respondent for the principal sum and the interest and the claim was dismissed on the grounds that the appellant had failed to include the particulars of the post-dated cheque in the memorandum. The learned Sessions Court Judge found that as the cheque was a security for the loan, its omission from the memorandum was fatal to the claim as the requirements of s. 16 of the Moneylenders Ordinance 1951 (the Ordinance) had not been complied with.

The question that arose on appeal was whether a post-dated cheque can be a security within the contemplation of s. 16(1) of the Ordinance.

Held:

[1] As it is clear that a post-dated cheque is not payable on demand and hence cannot fall within the definition of 'cheque' in s. 73(2) of the Bills of Exchange Ordinance 1949 (Revised-1978), it is not a security within the contemplation of s. 16 of the Ordinance. It has no value as it does not represent any property that a creditor can resort to in the event he wants to realise or recover the debt. It is nothing more than a promise to pay on a date in the future. Technically it is not even a cheque as it is not payable on demand.

[2] In the circumstances the memorandum signed by both the appellant and the respondent had complied with the requirements of s. 16 of the Ordinance and the contention that the memorandum has to include or make reference to the post-dated cheque does not arise at all.

[Appeal allowed with costs].

Cases referred to:
Abirami Ammal & Anor. v. M.S.M.M. Meyappa Chettiar [1959] 25 MLJ 149 ***(refd)***
Tan Wee Han & Anor. v. Meyappa Chettiar [1951] MLJ 227 ***(refd)***
Yik Wah Trading (Pte) Ltd. v. Tan King Kak & Anor. [1972] 1 MLJ 94 ***(dist)***

Legislation referred to:
Bills of Exchange Ordinance 1949 (Revised - 1978), ss. 13(2), 73(2)
Debtor and Creditor (Occupation Period) Ordinance 1948, s. 11
Moneylenders Ordinance 1951, s. 16(1), (3)

Other sources referred to:
Cheques in Law and Practice, M.S. Parthasarathy, 2nd Edn., (1972) p. 31
Concise Law Dictionary, Osborn (Eighth Edition)

Halsbury's Laws of England, Vol. 32, 4th Edn., p. 69, paragraph 116
Penal Law of India, Gour, 8th Edn., Vol. 4, p. 3053
The Post-Dated Cheque and Holding in Due Course, Dr. M.J.L. Rajanayagam, published in the Journal of Business Law, 1969, p. 33

For the appellant - Mohamed Hafiz; M/s. Reginald Vallipuram & Co.
For the respondent - C.Y. Ong; M/s. Ong & Ong

JUDGMENT

Mohd. Ghazali bin Mohd Yusoff JC:

This is an appeal against the decision of the Sessions Court Judge, Sessions Court, Johor Bahru, dismissing the claim of the appellant under the Moneylenders Ordinance 1951 for RM43,050 inclusive of interest.

On 29 November 1985 the respondent borrowed RM35,000 from the appellant, a private limited company carrying on the business of licensed moneylenders, to be repaid within a period of one month with interest at the rate of 12% per annum. Both parties signed a memorandum (exhibit P2) which contained the terms of the contract as required under s. 16(1) of the Ordinance. The loan was due to be paid on 29 December 1985 but the respondent failed to pay the sum borrowed and the interest due and hence this proceedings.

According to the appellant, a few days before payment was due the respondent brought a cheque (exhibit P3) dated 29 December 1985 issued by Multisan Orchids Sdn. Bhd., a company in which the respondent was the managing director, for the principal amount of RM35,000. However on 28 December 1985 the respondent requested him not to bank in the cheque as there were insufficient funds in the account. The respondent also requested for an extension of time for an indefinite period to pay the loan. Subsequently the respondent delivered another cheque for RM1,750 (exhibit P4) dated 29 January 1986 for payment of interest but before that date, again requested the appellant not to bank in this cheque due to there being insufficient funds. The appellant insisted that the loan was unsecured and therefore no security need be furnished. That being so no particulars of any security was entered in the memorandum (P 2) .

The respondent however gave another version. He gave evidence that the appellant requested for security in the form of a post-dated cheque from Multisan Orchids Sdn. Bhd. and thus, on the day the memorandum was signed, he handed a cheque for RM35,000 (P3). He gave evidence that he had borrowed the money from the appellant as Multisan Orchids Sdn. Bhd. needed money for its business operations and that it was the appellant who insisted that the loan be secured by a post-dated cheque from the said company.

At the hearing of the appeal, Counsel for the appellant restricted his submission to only one ground, namely, that the Sessions Court Judge erred in law when he held that failure to mention the post-dated cheque in the memorandum was a non-compliance of s. 16(3) of the Ordinance and was fatal to the claim. Although his grounds were somewhat skeletal and lacking in substance, it was clear that the Sessions Court Judge had accepted the respondent's version, namely, that the post-dated cheque was handed to the appellant on the same day when the memorandum was signed and since it was a security for the loan, its omission from the memorandum was fatal to his claim as the requirements of s. 16 of the Ordinance had not been complied with. This seems to be his main and only reason for dismissing the appellant's claim.

The Sessions Court Judge held that P3 was a post-dated cheque based upon the respondent's evidence that the serial numbers of several other cheques (not related to the loan) issued by Multisan Orchids Sdn. Bhd. show that the said post-dated cheque was issued prior to some of these cheques which were as follows:

Cheque number	Date of issue
176124	6 November 1985
176125	13 November 1985
176126 (exhibit P3)	29 December 1985
176127	29 November 1985
176128	29 November 1985
176140	9 December 1985
176141	24 December 1985
176142 (exhibit P4)	19 January 1986

The Sessions Court Judge had made a finding of fact that P3 was a post-dated cheque and I cannot find anything erroneous with his finding. It was a finding based on the credibility or bearing of a witness and I see no reason why I should disturb it.

However I find that he had failed to address his mind to the main issue in this case, namely, whether a post-dated cheque is a security within the contemplation of s. 16(1) of the Ordinance. As far as the Sessions Court Judge was concerned the appellant's claim failed as there was no reference to the post-dated cheque in the memorandum. That to my mind is not enough. He has to first decide whether a post-dated cheque can be a security within the contemplation of the Ordinance.

The requirements of s. 16 of the Ordinance with regard to security is best explained in the case of *Abirami Ammal & Anor. v. M.S.M.M. Meyappa Chettiar* [1959] 25 MLJ 149, at page 151, where the Judge said:

> Section 16 of the Ordinance clearly differentiates between the contract for the repayment of the loan and any security given in respect of that contract and it is of the contract that the note or memorandum must be delivered. That note or memorandum is required to contain all the terms of the contract and where it was a term of the contract that a particular security be given in respect of it, the particulars of that security would require to be stated either in terms or by reference (see *Reading Trust Ltd. v. Spero*). Nevertheless the Ordinance treats the contract and the security in respect of it as seperate and distinct things. There may be a contract without security; there may be contract with security. In either case the note or memorandum must embody the terms of the contract and in the latter case it must also embody in one way or another the terms of the security.

I do not think anyone is going to quarrel with what the Judge said in the case referred to above with regard to the requirements of s. 16 of the Ordinance. Under the Ordinance, a moneylender may lend money with or without security. But can a post-dated cheque qualify as a security? The word 'security' is not defined in the Ordinance. According to Osborn's **Concise Law Dictionary** (Eighth Edition) the word 'security' means:

> a possession such that the grantee or holder of the security holds as against the grantor a right to resort to some property or some fund for the satisfaction of some demand, after which satisfaction the balance of the property or fund belongs to the grantor. There are thus two persons with an interest but the right of one has precedence over the other.

In *Tan Wee Han & Anor. v. Meyappa Chettiar* [1951] MLJ 227, at page 229, in dealing with s. 11 of the Debtor and Creditor (Occupation Period) Ordinance, 1948, Taylor J. said:

> The word 'security' also has several meanings; sometimes it means the property:- where land is mortgaged the land is security for the debt; sometimes it means the instrument:- a mortgage is a security for money lent. In s. 11 I think 'security' is used in the former of these senses; furnishing the security means making property available to be charged; executing the charge (which is formalising the security) is provided for in those words.

Halsbury's Laws of England, Vol. 32, 4th Edn. at p. 69, in dealing with the topic "Loans Of Money; Control Of Moneylenders", summarises security for loans, at paragraph 116, as follows:

> The repayment of a loan may be secured by the giving of security in various forms, for example:
>
> (1) by the giving of a bill of sale over goods intended to remain in the borrower's 'possession;
> (2) by the mortgage of land or property other than personal chattels:
> (3) by the pawn or pledge of goods;
> (4) by the giving of a bottomry bond on a ship and cargo or a respondentia bond on the cargo alone;
> (5) by the issue of debentures or debenture stock or of a certificate of deposit;
> (6) by the deposit of bills of exchange, stocks and shares, life assurance policies or documents of title to goods.

From the above references it is clear that the word 'security' would seem to imply something in addition to the mere obligation of the debtor, that is, something which the creditor can resort in order to aid him in realising or recovering the debt, in case the debtor fails to pay. However there do not seem to be any local authority on the question whether a post-dated cheque can be termed a security within the contemplation of the ordinance.

In criminal law, a post-dated cheque is only a promise to pay upon the date to which it has been posted and the giving of a post-dated cheque, which is later dishonoured, for goods already received does not constitute a criminal offence. According to Gour: **Penal Law of India,** 8th Edn., Vol. 4, at p. 3053:

> A cheque is only a promise to pay, either on demand, or upon the date to which it has been posted. Therefore, the only effect of a receipt of payment by cheque is an acknowledgment that a promise to pay has been given by the drawer to the drawee. The receipt does not extinguish or release any legal right and is not a valuable security even within the last part of s. 30. Where, therefore, a person gives a post-dated cheque in payment for goods already received and the cheque is dishonoured, there is only a breach of promise for which the remedy lies in a Civil Court, but the person cannot be held guilty of cheating.

Under the Bills of Exchange Ordinance 1949 (Revised - 1978), it would seem that post-dated cheques, are valid. Section 73(2) of this Ordinance provides "A cheque is a bill of exchange drawn on a banker payable on demand and s. 13(2) provides "A bill is not invalid by reason only that it is ante-dated or post-dated or that it bears a date on Sunday". Thus a cheque comes under the term 'bill' used in s. 13(2) of the 1949 Ordinance and therefore a cheque is not invalid by reason of it being post-dated.

However a post-dated cheque is not **payable on demand** and therefore, cannot fall within the definition of 'cheque' in s. 73(2) of the 1949 Ordinance. It becomes payable

only at a future date. This would seem to imply that a post-dated cheque has no value at the time it was issued as you cannot demand immediate payment for it. It only tantamounts to an acknowledgment of a debt or a mere promise to pay in the future. It does not represent any fund or property available immediately. Dr. M.J.L. Rajanayagam in his article "**The Post-Dated Cheque and Holding in Due Course**", published in The Journal of Business Law, 1969, p. 33, is of the view that a post-dated cheque is not a cheque in law. This is what he said at p. 36:

> It is submitted that an instrument in the form of a cheque which is post-dated is not a cheque in law. Therefore, a banker who pays such an instrument before the due date is unable to debit the customer's account with the amount.

It is clear that payment cannot be made before the date mentioned in a post-dated cheque and that banks generally only allow payment to be made on its due date provided there are sufficient funds to cover it. It does not imply at all that the drawee already has money in the bank to the amount shown on the cheque at the time when it is first drawn. M.S. Parthasarathy in his book entitled **"Cheques In Law And Practice"**, 2nd Edn. (1972) at p. 31 said:

> However, if a post-dated cheque is presented before the date it bears, the banker would do well not to pay it since the possibility of the cheque being countermanded, or the occurrence of the customer's death, bankruptcy, etc. before the date of the cheque cannot be ruled out. In *Pollock v. Bank of New Zealand* [1901] 20 NZLR 174 the bank was held liable for damages in circumstances arising out of the premature payment of a post-dated cheque.

Counsel for the respondent made reference to the case of *Yik Wah Trading (Pte) Ltd. v. Tan King Kak & Anor.* [1972] 1 MLJ 94 where cheques were also in issue in a money lending dispute. In that case the Court held, amongst other reasons, that the claim by the moneylender against the borrower failed as the former had failed to set out the exact terms of their contract with the alleged borrower and had also acted illegally in securing undated cash or bearer cheques from the alleged surety. The security given was in the form of a promissory note and the Court found that the terms of the contract had not been set out accurately in the note. Furthermore the cheques were not made out in the name of the moneylender and thus the Court held that the taking of such cheques were illegal, as being additional securities, it was omitted from the contract between the two parties. I find that this case has no bearing on the instant case as the facts there were different. Furthermore there was no discussion as to whether post-dated cheques are securities within the contemplation of s. 16 of the Ordinance.

As it is clear that a post-dated cheque is not payable on demand and hence cannot fall within the definition of 'cheque' in s. 73(2) of the Bills of Exchange Ordinance 1949 (Revised - 1978), it is my finding that it is not a security within the contemplation of s. 16 of the Moneylender's Ordinance 1951. It has no value as it does not represent any property that a creditor can resort to in the event he wants to realise or recover the debt. It is nothing more than a promise to pay on a date in the future. Technically it is not even a cheque as it is not payable on demand. In the instant case it is my finding that the memorandum (P2) signed by both the appellant and respondent had complied with the requirements of s. 16 of the Ordinance and the contention that the memorandum has to include or make reference to the post-dated cheque (P3) does not arise at all.

For the above reasons I would allow this appeal with costs here and below.